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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 980

FRANK CRISONA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

FRANK CRISONA,

Petitioner,

—against—

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Frank Crisona respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 25, 1969.

Opinion Below

The opinion of the Court of Appeals, reported at 416 F.2d 107, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 25, 1969. A timely petition for rehearing and/or rehearing *en banc* was denied on October 24, 1969.

Thereafter, on November 15, 1969, Mr. Justice Harlan signed an order extending the time within which to file the petition up to and including December 23, 1969. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether, in light of *Alderman* v. *United States*, 394 U.S. 165 and *Dennis* v. *United States*, 384 U.S. 855, The erroneous withholding of "3500" material and the like from defense counsel at the trial should still be governed by a harmless error rule.

Statutes Involved

Rule 16, F.R.Cr.P. Discovery and Inspection

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

Statement of the Case

Petitioner, a New York attorney for over twenty-five years (during which time he served as an Assistant District Attorney in Queens County for ten years and also as a confidential law secretary to a Justice of the New York State Supreme Court) was charged in a thirty-count indictment alleging that during the period from January 1, 1965 up to and including January 23, 1967, the petitioner and five co-defendants, John DeLyra, Anthony DeLyra, Dominic C. Lomardo, John Martin Nieman and Frank Lloyd Parks devised a scheme to defraud a number of individuals of sums of money in excess of $5,000. The indictment charged all six defendants with conspiracy in violation of 18 U.S.C. 371 and charged each of them with a varying number of substantive counts based on six separate alleged fraudulent transactions involving alleged violations of 18 U.S.C. 1343 (use of the wires to defraud); 18 U.S.C. 1341 (mail fraud); and 18 U.S.C. 2314 (inducing interstate travel in execution of a fraud and interstate transportation of the proceeds of a fraud).

The basic charge was that the defendants, operating through a corporation called Colombia Resources Ltd., created a scheme to defraud by representing to various businessmen seeking loans that the corporation was in a position to obtain mortgage money for them, and in furtherance of the scheme prepared a false financial statement showing assets in excess of $27 million. On the basis of these and other asserted false representations, the defendants, it was further charged, obtained advance fees from the persons seeking the mortgage money.

Two defendants, Nieman and Lonardo, pleaded guilty in advance of trial, and Nieman testified as the government's principal witness. All of the remaining defendants were convicted on some of the counts. Petitioner was convicted on ten of the twenty-nine counts in which he was charged and received a three-year concurrent sentence under 18 U.S.C. 4208(a) on each of the counts.

The evidence at the trial disclosed that petitioner had been retained by Nieman as the attorney for Colombia Resources, and that in each of the transactions in which he was named as a defendant, prepared the various legal documents and agreements which were required. The evidence further disclosed that Crisona had not been a party to either the creation of the fraudulent balance sheet or its submission to Dunn and Bradstreet as a basis for a favorable credit rating.

The petitioner took the stand in his own defense. He testified that in all of the transactions in which he had been involved, he acted exclusively as a lawyer and had been "taken in" by Nieman (who had a long record of fraud and "confidence" type convictions).

Apart from the testimony given by Nieman and the evidence concerning the improper cashing of a check not directly related to any of the allegedly fraudulent transactions, the only evidence against petitioner consisted of the testimony of the representatives of four of the concerns which had paid advance fees as to certain statements made to them by petitioner which, the prosecutor argued, were false or misleading.

The only seriously damaging witness among these was Richard Crake, also an attorney, from San Francisco. He

testified that he represented the Sunrise Mountain Corporation in its efforts to obtain mortgage financing through Colombia Resources and that he dealt extensively with petitioner in connection with these efforts during the period from December, 1965 to January, 1966.

Near the close of his direct testimony, Crake testified that while in New York in mid-January in an effort to finalize the transaction, he had several conversations with petitioner —the last of which, on January 18, he recorded on tape. The tape was then introduced into evidence (8a, 9a-13a)* and played to the jury (8a, 9a-13a).**

Thereafter, defense counsel learned from an examination of a prior statement of Crake produced pursuant to 18 U.S.C. 3500 that Crake had taped other telephone conversations between himself and petitioner and he called for their production. The trial judge denied the request, ruling that they were producible neither under 18 U.S.C. 3500, *Brady* v. *Maryland*, 373 U.S. 83 (1963), or Rule 16 of the Federal Rules of Criminal Procedure. With regard to Rule 16, the trial court seemed to rule that the tapes, taken as they were during the alleged commission of the crime, were not "statements" within the meaning of Rule 16(a).

On appeal, the Second Circuit disagreed. It ruled that the tapes were "statements" within the meaning of Rule 16(a), and that the trial court erred in holding that they were non-producible.

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* Page references followed by the suffix "a" are to petitioner's appendix to his brief in the Court below. Those preceded by "TM" are to the transcribed trial minutes.

** It was replayed for the jury during the prosecutor's summation, the prosecutor arguing that petitioner's voice "reeked of guilt" and that his evasiveness was the "hallmark of a con man" (TM 2579-2580).

Although noting that "the usefulness of such statements should ordinarily be assessed by defense counsel rather than by us," and stating that it expects "that that will be the procedure in the future," the court below nevertheless found that the error did not warrant reversal of the conviction. In reaching this conclusion, it pointed to two factors: (1) that it had closely examined the *transcripts* of the tapes and found that ". . . they contain no information which could reasonably have been additionally useful to the defense," and (2) that ". . . the cumulative evidence of defendants' guilt adduced at trial was very substantial indeed." In support of its position, the court cited two cases: *Rosenberg* v. *United States,* 360 U.S. 367 (1959) and *United States* v. *Annunziato,* 293 F.2d 373, 381-2 (2d Cir.), cert. denied, 368 U.S. 919 (1961).

Reasons for Granting the Writ

The decision below raises an important question of federal law which should be decided by this court: whether, in light of *Alderman v. United States,* 394 U.S. 165, and *Dennis v. United States,* 384 U.S. 855, the erroneous withholding of "3500" material and the like from defense counsel at the trial should still be governed by a harmless error rule.

This petition squarely raises an important and recurring issue in the administration of federal criminal justice: to wit, where material such as witness statements producible under 18 U.S.C. 3500 or defendants' statements producible under Rule 16(a), F.R.Cr.P.,* are found on appeal to have

* In this case, the material in question, tapes and transcripts of conversations between the petitioner and the government witness, Crake, are a sort of a hybrid. Although held producible under Rule 16(a) as statements of the petitioner, they also contain statements of Crake which could have been the source of potential impeaching material *à la* 18 U.S.C. 3500.

been erroneously withheld from defense counsel at the trial, what is the appropriate action which the appellate court should take?

The federal circuit courts, guided in large measure by decisions of this Court such as *Rosenberg* v. *United States,* 360 U.S. 367 (1959), have almost without exception applied a harmless error test in determining whether the erroneous non-production of "3500" statements at the trial should result in a reversal of the conviction. See e.g. *United States* v. *Annunziato,* 293 F. 2d 373, 382 (2d Cir. 1961); *United States* v. *Allegrucci,* 299 F.2d 811, (3d Cir. 1962); *Moore* v. *United States,* 349 F.2d 963 (D.C. Cir. 1965); *Hayes* v. *United States,* 329 F.2d 209 (8th Cir.), cert denied, 377 U.S. 980 (1964).

More recently, this Court has decided two cases, *Dennis* v. *United States,* 384 U.S. 855, and *Alderman* v. *United States,* 394 U.S. 165, which, although not directly on point, raise serious doubts as to the continued vitality of the *Rosenberg* harmless error rule.

In *Dennis,* the Court, without saying a word about the harmless error test, reversed the convictions of a number of defendants solely because the trial court had erroneously refused to furnish certain government witnesses' prior grand jury testimony to defense counsel.

The Court, it is true, discussed the nature of the evidence in the case in dealing with the preliminary question as to whether the grand jury minutes should have been disclosed. However, once it found that a "particularized need" had been shown and production should have been ordered, it immediately concluded that the convictions would have to be reversed.

Its reasoning was that defense counsel was entitled to the witnesses' grand jury minutes "while those witnesses were available for cross-examination," *Dennis*, at p. 875, and that "[t]he determination of what may be useful to the defense can *properly* and *effectively* be made only by an advocate," *Id.* (emphasis added). The Court did not say that the convictions had to be reversed because the evidence was weak*, because more than one set of grand jury minutes had been withheld or because the minutes contained potentially valuable impeachment material.** This Court simply said it was reversing because defense counsel was entitled to have these materials, and was entitled to have them in connection with his cross-examination.

Then, just last Term, this Court decided *Alderman*, supra, 394 U.S. 164. There the Court was faced with the problem of establishing procedures for determining whether electronic eavesdropping conducted in violation of a defendant's Fourth Amendment rights had tainted any of the evidence which was used to convict him. The government pressed for a rule under which the electronic eavesdropping information would be first submitted to a trial judge for an *in camera* examination, and that the defendant would then be furnished with any material which would be "arguably relevant."

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* The Court did talk about the fact that *Dennis* was a conspiracy case, that such a prosecution "carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants," and that "under these circumstances, it is especially important that the defense, the judge, and the jury should have the assurrance that the doors that may lead to the truth have been unlocked." *Dennis*, supra, at 873.

However, the instant case also involves a conspiracy and a purported co-conspirator as the government's principal witness.

** The Court's opinion is totally silent on the issue.

This Court rejected this proposal, holding instead that "surveillance records as to which petitioner has standing to object should be turned over to him without being screened *in camera* by the trial judge." The Court continued that:

> "Admittedly, there may be much learned from an electronic surveillance which ultimately contributes nothing to probative evidence. But winnowing this material from those items which might have made a substantial contribution to the case against a petitioner is a task which should not be entrusted wholly to the court in the first instance. It might be otherwise if the trial judge had only to place the transcript or other record of the surveillance alongside the record evidence and compare the two for textual or substantive similarities. Even that assignment would be difficult enough for the trial judge to perform unaided. But a good deal more is involved. An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the Government's case."

Petitioner submits that these two cases raise serious questions as to whether the harmless error rule should continue to be applicable to the erroneous withholding of "3500" and "Rule 16" statements from defense counsel at the trial.

Petitioner contends that the non-production of material potentially useful to the defense can never be harmless error because, as Mr. Justice Brennan pointed out in his dissenting opinion in *Rosenberg* v. *United States,* 360 U.S. at 375, "... it is impossible for a judge to be fully aware of all the possibilities for impeachment inhering in a prior statement. . . ." An appellate court, no matter how conscientious or thorough its search, cannot fill the shoes of a skillful defense attorney. And to attempt to speculate, as the panel did here, that defense counsel could not have made any use of the tapes which might have affected the result is to engage in a futile and misleading form of metaphysics.

Petitioner concedes that there are distinguishing features between the facts here and those present in *Alderman* and *Dennis.* However, this Court's automatic reversal for non-production of the witnesses' grand jury testimony in *Dennis* and its rejection of a rule which would allow the Court to make an initial screening of eavesdropping material in *Alderman* to determine whether any of the material was "arguably relevant" to the evidence introduced at trial raise substantial doubts as to the present vitality of the applicability of harmless error rule to the erroneous withholding from defense counsel of material to which he is entitled. This Court should here grant certiorari to consider this important question.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 624, 625, 626, 627—September Term, 1968.

(Argued May 23, 1969 Decided September 25, 1969.)

Docket Nos. 33130, 33131, 33132, 33133

UNITED STATES OF AMERICA,

Appellee,

—against—

FRANK CRISONA, ANTHONY DELYRA, JOHN DELYRA, and FRANK LLOYD PARKS,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge,*
FEINBERG, *Circuit Judge,* and TIMBERS, *District Judge.**

Appeals from convictions after a jury trial in the United States District Court for the Southern District of New York, Thomas F. Murphy, *J.*, for fraud and conspiracy to defraud in violation of 18 U.S.C. §§ 371, 1341, 1343, 2314. Affirmed.

MAURICE EDELBAUM, New York, N. Y., *for appellant Crisona.*

JAMES M. LA ROSSA, New York, N. Y., *for Appellant Anthony DeLyra.*

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* Chief Judge of the District of Connecticut, sitting by designation.

JOSHUA N. KOPLOVITZ, New York, N. Y. (Koplovitz and Fabricant, on the brief), *for Appellant John DeLyra.*

EUGENE J. MORAN, New York, N. Y., *for Appellant Parks.*

JAMES D. ZIRIN, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Kevin J. McInerney, Elkan Abramowitz, Assistant United States Attorneys, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge*:

This appeal is from four judgments of conviction entered in the United States District Court for the Southern District of New York on December 11, 1968, after a four week trial before Thomas F. Murphy, *J.*, and a jury. Defendant Frank Crisona was found guilty on ten counts covering violation of the wire fraud statute, 18 U.S.C. § 1343, inducing interstate travel in execution of a fraud and interstate transportation of the proceeds of a fraud, 18 U.S.C. § 2314, and conspiracy, 18 U.S.C. § 371. Defendants Anthony and John DeLyra were found guilty on substantially similar counts and also on one count of mail fraud, 18 U.S.C. § 1341. Frank Lloyd Parks was convicted of a total of seven counts for wire and mail fraud, interstate travel in execution of a fraud, and conspiracy. The first three defendants were each sentenced to three years, and Parks to one year, imprisonment on all counts to run concurrently.

Prior to trial two other defendants, Dominic C. Lonardo and John Martin Neiman, pleaded guilty to one and 17 counts, respectively, and subsequently Neiman testified as a government witness.

I. The Conspiracy

The indictment charged all four appellants, Neiman and Lonardo with conspiring to defraud and actually defrauding many individuals and corporations. While only Parks challenges the sufficiency of the voluminous evidence developed at trial, a summary of the numerous and complex financial dealings which underlie appellants' convictions is helpful in considering the various legal issues raised. The evidence introduced by the Government allowed a jury to find the following.

Crisona, a former Assistant District Attorney for Queens County, New York, first met Neiman, whom the Government aptly describes as a "professional confidence man with a long criminal record," in October 1964, when they engaged in a joint attempt to salvage financially a summer camp in which Crisona had an interest. The attempt failed, and the camp was lost, leaving Crisona $15,000 in debt to a loan shark, but the business association between the two men survived. In the summer of the following year, Neiman entered into negotiations with one William Sikora, a New Jersey real estate operator, to provide Sikora with a commitment for a $3,000,000 loan, and persuaded him to pay a security deposit of $10,000 in the form of a check made out to Crisona, as attorney, to be held in escrow pending the funding of the loan. Crisona promptly cashed the check and split up the proceeds between himself, Neiman and Crisona's loan shark. Ap-

parently during this period Crisona first met Anthony DeLyra, with whom Neiman had done business in the past, and Parks, a former stockbroker who used an office in the same building as John DeLyra. Anthony was introduced to Sikora as an individual who would advance sums for the latter's loan and Parks was presented to him as the stockbroker who was going to handle the financing. Evidently no loan was ever consummated.

In October 1965, Neiman and the DeLyras somehow came into possession of a stolen $9,200 cashier's check payable to a recently deceased woman named Mary McCarthy. Pursuant to Crisona's suggestion a joint checking account in the names of Mary McCarthy and a fictitious John O'Brien was opened in a branch of the Franklin National Bank and the check deposited in it. Within the next few days Crisona signed two checks in the name of John O'Brien for $5,600 and $3,500 and he and Neiman then cashed them at the bank and divided up the proceeds among themselves and the two DeLyras. The bank, however, discovered that Mary McCarthy was dead. The check was dishonored, and Crisona was notified that he would be held responsible for the $9,100 overdraft.

In November 1965, Neiman, Crisona and the DeLyras, who were apparently all in debt, and Parks, who was unemployed, devised their basic scheme of utilizing a foreign corporation owned by John DeLyra, Columbia Resources, Ltd., to issue real estate financing commitments. To make the corporation appear financially sound, they prepared a false financial statement showing a net worth of $11,000,000,[1] which was submitted to Dun and Bradstreet as

[1] This was later altered to show even greater worth.

a basis for a credit rating, along with false resumes of the backgrounds of four officers of Columbia, two of whom were pseudonyms for Neiman and Anthony DeLyra. Utilizing this false statement, and the excellent Dun and Bradstreet rating they eventually received, and variously presenting themselves as officers of the corporation, often under assumed names, the defendants thereafter used Columbia Resources as a front for obtaining advance fees from various individuals and corporations in return for letters of intent or commitments to secure real estate financing. In most instances the advance was presumably to be held in escrow by Crisona, as attorney, pending the funding of the loan, but was in fact immediately distributed among Neiman and the defendants. None of the Columbia loan financings was ever consummated.

The specific transactions of this nature which form the basis of the various counts on which appellants were indicted may be outlined briefly, as they all follow substantially the same pattern.

(1) *Kline.* In November 1965, Neiman was referred to a Boston real estate developer, Sydney Kline, to whom he sent a copy of the false financial statement and offered a commitment for a $700,000 first mortgage to finance a nursing home which Kline planned to construct. A man named Graeber, acting for Neiman, went to Boston and attempted to secure a two per cent standby fee or deposit from Kline in return for a commitment letter. At Graeber's suggestion Kline spoke on the telephone to Crisona, who assured him that Columbia was a reputable firm which he had often represented and that Kline's check for the advance fee would be held in escrow pending completion of the transac-

tion. Kline then wrote out a check for $13,500 to Crisona which Crisona, when he received it, promptly cashed and distributed among his colleagues.

In late December, a second commitment of $125,000 for another nursing home was arranged with Kline after a purported appraisal of the property by John DeLyra, under a false name, who elicited another standby fee check for $2,500 which was again supposed to be held in escrow. When Kline became suspicious of the lack of progress in the financing he called Crisona and asked for his money back, but was told that it had been turned over to Columbia.

(2) *Sunrise Mountain Corp.* In December 1965, Neiman made contact with A. Earle Brown, the owner of Sunrise Mountain, a development corporation which was in Chapter XI reorganization; Brown was seeking a $3,000,000 loan for a real estate project in Las Vegas. At initial meetings between Brown, Neiman—under an assumed name—and Crisona, it was agreed that Sunrise would pay a $30,000 standby fee to Columbia for a $3,000,000 loan commitment. Crisona assured Brown of the corporation's reliability and its ability, based on the false financial statement, to fund the loan. Subsequently, Brown and his attorney, Richard Crake, met with Crisona, Neiman and Parks, who was introduced as a Columbia officer who acted as a West Coast liaison man. Crisona again made assurances of his own and Columbia's respectability and it was agreed that out of the standby payment Crisona would receive a $7,500 attorney's fee with the balance being placed in escrow. As the date when the funding was scheduled drew near, however, Crisona persuaded Brown and Crake, who was co-escrowee with Crisona,

to release the escrow fund, finally assuring them that the closing of the funding would take place the same day. Crisona immediately deposited the escrow check and distributed the proceeds, using a portion of them to pay off the overdraft caused by the McCarthy-O'Brien transaction. He never showed up for the closing, which continued to be repeatedly postponed with a variety of excuses. During January 1966, Crake had a number of telephone conversations with Neiman, Crisona, and Parks, at least some of which he tape recorded. On January 19, Crake and Brown finally went to the office of the United States Attorney for the Eastern District of New York and requested an investigation of Columbia.

(3) *Tuller.* At approximately the same time, Neiman and Anthony DeLyra, again using false names, obtained a check for $8,500, in return for a letter of intent to obtain a $850,000 loan for a Julliard Tullar of Silver Springs, Maryland. As usual, the closing of the loan was repeatedly delayed and as a result, the mortgage on Tuller's property was foreclosed at a loss of $300,000.

(4) *Menlove.* In February 1966, Parks and Neiman persuaded Roy Menlove, a Salt Lake City motel owner, to put up an advance fee of $11,000 for a prospective $1,100,000 loan by Columbia, after Parks had conducted an "appraisal" of Menlove's property and Menlove had been furnished a copy of the Dun and Bradstreet report based on the false financial statement on Columbia. The loan closing was twice adjourned and never took place.

(5) *Fazio.* In return for a letter of intent to provide a $1,500,000 loan for a motel, a Mr. Fazio in Cleveland gave Neiman a check for $11,500 on account. The loan was not funded.

(6) *Howard Rome.* In April 1966, after negotiations between Neiman, Parks, John DeLyra, Crisona and a Howard Rome in Cleveland, it was agreed to arrange a $1,350,000 loan for Rome with a $13,500 advance fee. Once again these negotiations involved an "appraisal" by Parks, false financial information, aliases and a variety of lies about the identity and experience of purported Columbia Resources executives. Crisona dissuaded Rome from putting the advance in escrow and it was divided among various participants.

(7) *Indianapolis.* In July 1966, Neiman and John DeLyra persuaded Morris Mitchell and Ary Infante, Indianapolis businessmen, to advertise that their company had funds available for loans and to refer prospective customers to Columbia in return for 25 per cent of advance fees collected. Over the following weeks Neiman and the two DeLyras collected a total of $19,000 in advance fees from customers so recruited.

Defendant Crisona testified in his own behalf that he had acted exclusively as a lawyer in the transactions with which he was involved, that in effect he was innocently misled by Neiman and that he never intended to defraud anyone or knowingly made any false representations. By its verdict the jury clearly discredited this testimony. Defendant Parks testified that he was unaware of the fraudulent nature of the enterprises and that the appraisals he conducted were done in good faith. Neither of the DeLyras took the witness stand.

On appeal, defendants jointly and separately raise a number of claims of error in the proceedings below. In addition, appellant Parks attacks the sufficiency of the evidence against

him. We will discuss these various arguments in turn; as will be seen, we find none of them persuasive.

II. Failure to Turn Over Tape Recordings

Crisona's main argument on appeal, adopted by all of the other defendants insofar as applicable to them, relates to the district court's refusal to order the Government to turn over to the defense tape recordings made by Crake, the lawyer in the Sunrise Mountain Corporation transaction, of various telephone conversations. Crake testified about one such conversation, held on January 18, 1966, in which Crisona told Crake that the $7,500 advance fee had been turned over to Columbia Resources, reassured him that the corporation was "legitimate," and described to him some of the other successful "deals" by Columbia on which Crisona had worked. Toward the end of Crake's direct testimony, he identified a tape, which was subsequently received in evidence and played to the jury, as a recording of this January 18 telephone conversation. Crake also recorded a number of other telephone conversations including several with Crisona and Neiman and Parks. Crake turned these tapes over to the F.B.I., but none was introduced at trial except for the one of the January 18 conversation. At trial, defense counsel called for the production of all of the tapes, basing their request alternatively on 18 U.S.C. §3500, Rule 16 of the Federal Rules of Criminal Procedure, and the doctrine of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The trial judge denied disclosure of the tapes on all three grounds, and all are raised here on appeal. Defense counsel also asked the judge to listen to the tapes himself or to mark and seal them as

a court exhibit for appellate review, but he declined both suggestions.

1. *Section 3500*

Appellants' first argument is that the tapes should have been turned over to the defense under the provisions of the Jencks Act, 18 U.S.C. §3500:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness . . . to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

Under subsection (e) the term "statement" as used in subsection (b) is defined as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

The court below declined to order the tapes turned over to defense counsel under section 3500. The apparent ground

for the ruling was that Crake had not testified about any recorded conversation other than the one on January 18—the transcript and tape of which were turned over since the Government introduced them into evidence—and there was no showing that the remaining tapes related to the subject matter of the direct testimony. We need not consider the correctness of this restrictive interpretation of section 3500(b), see *United States* v. *Birnbaum*, 337 F. 2d 490, 497-98 (2d Cir. 1964), since we find that the tapes were not "statements" within the meaning of the Jencks Act. The tapes of these telephone conversations do not come within subsection (e)(2) as they are not recordings of oral statements made to a government agent. Nor, as appellant Anthony DeLyra contends, are the recordings and the transcripts made from them "in effect" a written statement under subsection (e)(1).

Our decision in *United States* v. *Birnbaum, supra,* is not inconsistent with this analysis. There we upheld the refusal of the trial judge to turn over to the defense tape recordings of two conversations between the defendant, indicated for bribing an Internal Revenue agent, and a government witness. While we noted that "[t]here is no dispute that the transcripts [of the recorded conversations] are 'statements' within the meaning of subsection (e) of the Act," 337 F. 2d at 497, that dictum was based on circumstances in which the recordings were made at the direction of the F.B.I. with the specific objective "to garner evidence of appellant's complicity in the bribery scheme." *Id.* at 498. In the factual situation there present the statements of witnesses might reasonably be construed as being made "to an agent of the Government." Indeed, there is

authority for interpreting the Jencks Act not to apply at all to the sort of pre-investigatory communications involved in this case. Thus, the Seventh Circuit, upholding a refusal to turn over to the defense a contemporaneous tape recording of a conversation between the payer and the recipient of a bribe—witness and defendant, respectively—in a subsequent prosecution for extortion, has defined Jencks Act material succinctly:

> A § 3500 statement is a recorded recital of past occurrences made by a prospective prosecution witness. From its very nature, necessarily it is made after those events have taken place.

United States v. *Sopher*, 362 F. 2d 523, 525 (7th Cir.), cert. denied, 385 U.S. 928 (1966). Cf. *Battaglia* v. *United States*, 349 F. 2d 556, 560 (9th Cir.), cert. denied, 382 U.S. 955 (1965). We need not now decide whether we would similarly limit the scope of material obtainable under the Act in an appropriate case, although our dictum in *Birnbaum* clearly looks the other way. It is sufficient for the purposes of this appeal that the telephone conversations of witness Crake were in no sense "to an agent of the Government."[2]

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[2] The record indicates that at one point during the trial counsel for defendant Parks speculated that Crake, since he had been to see the United States Attorney in Brooklyn, might have been acting at the latter's direction in taping the conversations and thus "as an agent" of the Government. The trial judge suggested that counsel could readily ascertain that fact by asking either that government attorney or Crake. Counsel did not pursue the matter further on the record. In any event, it is clear that Crake began taping the conversations before he visited the United States Attorney and there is nothing in the record to indicate that he continued to do so by virtue of governmental instructions.

2. *Rule 16(a)*

Appellants next contend that the tapes or transcripts should have been produced under Fed. R. Crim. P. 16(a):

> Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government . . . .

The trial judge denied such a request on the theory that the section does not cover statements made by a defendant prior to arrest.[3] On appeal the Government vigorously defends that ruling, contending that "statements or confessions" under Rule 16(a) do not include pre-arrest statements made by a defendant during the course of the commission of a crime. The question has divided trial judges; the authorities were collected most recently by Judge Frankel in the Southern District of New York in a thorough opinion. *United States* v. *Rosenberg*, 299 F. Supp. 1241 (S.D.N.Y. 1969). While noting that the judges of that district had reached different conclusions on the subject, he concluded that tape recordings taken of conversations in which the defendant allegedly offered an Internal Revenue agent bribes were clearly "state-

[3] Before the trial, Judge Mansfield denied a similar Rule 16(a) motion by Anthony and John DeLyra on the ground that a recording made at the time of an offense is not a statement under 16(a). *United States* v. *Crisona*, 271 F. Supp. 150, 157 and n. 15 (S.D.N.Y. 1967), modified in unpublished memorandum, Jan. 10, 1968.

ments" under Rule 16(a) and discoverable by defendant. For similar district court rulings, see, e.g., *United States* v. *Lubomski*, 277 F. Supp. 713, 719-22 (N.D. Ill. 1967); *United States* v. *Iovinelli*, 276 F. Supp. 629, 630-31 (N.D. Ill. 1967); *United States* v. *Leighton*, 265 F. Supp. 27, 34 (S.D.N.Y. 1967); cf. *United States* v. *Baker*, 262 F. Supp. 657, 671-72 (D. D.C. 1966). The bases of these decisions have been that the language of amended Rule 16(a) is unqualified in contrast to the limited definition of "statement" in section 3500, that the Notes of the Advisory Committee indicate that the amended Rule was intended to apply even to pre-arrest statements made by a defendant during the course of his crime and was meant to broaden materially the scope of discovery available to a defendant,[4] that such a statement is obviously of such vital importance to the defense that fairness compels its disclosure, and that guilty pleas will thereby be encouraged. This broad interpretation of "statement" in Rule 16(a) is supported by the recent recommendation of the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 62 (1969) that a defendant receive before trial all of his statements

> regardless of to whom they were made—whether a prosecuting attorney, an investigator, a grand jury . . . , or anyone else. It is also intended that statements be discoverable regardless of how they are obtained, whether surreptitiously or voluntarily.

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[4] In amending the Rule in 1966, the Advisory Committee noted that:

> The defendant is not required to designate because he may not always be aware that his statements or confessions are being recorded. . . . Discovery of statements and confessions is in line with what the Supreme Court has described as the "better practice" (Cicenia v. LaGay, 357 U.S. 504, 511 (1958)) . . . .

We agree with these conclusions and see nothing in the plain language of Rule 16(a) or the Notes of the Advisory Committee accompanying it which would justify imposing the limitation suggested by the Government. See *United States* v. *Knohl*, 379 F.2d 427, 441-42 (2d Cir.), cert. denied, 389 U.S. 973 (1967) (dictum).

Having concluded that the tapes of defendants' conversations are "statements" under Rule 16(a), we must still decide whether failure to turn them over was reversible error. The Government points out that the language of the section is not mandatory—"the court *may* order the attorney for the government" (emphasis added)—and indeed this has been the focus of another dispute in the district courts over what showing of need, if any, a defendant must make in the ordinary case to compel inspection of his statement. E.g., compare *United States* v. *Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968), with *United States* v. *Louis Carreau, Inc.*, 42 F.R.D. 408 (S.D.N.Y. 1967). We note that weighty scholarly authority supports the proposition that withholding a defendant's statement should be the exception, not the rule, subject to the court's power to impose a protective order when appropriate. See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 52-53, 58-61 (1969); 8 Moore, Federal Practice ¶16.05[1] (2d ed. 1969). However, we need not discuss that issue more fully because the trial judge here ruled as a matter of law—not of discretion—that the tapes did not qualify as statements.

On the facts of the present case, however, we hold that the trial judge's failure to compel disclosure of the tape

recordings under Rule 16(a) was not reversible error. Aside from the one recorded conversation to which Crake testified and which was played to the jury, a transcript of which was furnished the defense, none of the others was introduced in evidence. While none of the latter tapes was otherwise made available to the defendants, we have closely examined the transcripts[5] of the tapes and find that they contain no information which could reasonably have been additionally useful to the defense. Moreover, we note that the cumulative evidence of defendants' guilt adduced at trial was very substantial indeed. In sum, while the tape recordings of conversations of defendants were "statements" under Rule 16(a), we find that the court's failure to make them available was not in fact harmful.[6] Cf. *Rosenberg* v. *United States*, 360 U.S. 367 (1959); *United States* v. *Annunziato*, 293 F. 2d 373, 381-82 (2d Cir.), cert. denied, 368 U.S. 919 (1961). We are well aware that the usefulness of such statements should ordinarily be assessed by defense counsel rather than by us, and we expect that that will be the procedure in the future. In any event, we will apply the interpretation of Rule 16(a) that we adopt here to all motions made thereunder after this opinion is filed.

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[5] These have been furnished to us by the Government, and we are lodging them with the Clerk of the Court in a sealed envelope pending further review, if any, of the case.

[6] We put to one side the fact that counsel for Parks did not specifically request the tapes at trial. We note that it was not clear at trial that conversations with Parks had been recorded; that information is disclosed by the transcripts of the tapes.

3. *Brady* v. *Maryland*

The third ground of alleged error involving the tapes is based on the doctrine of *Brady* v. *Maryland,* 373 U.S. 83 (1963), under which the prosecution is required to turn over to the defense any material evidence in its possession which is favorable to the accused. Although the prosecution below represented to the trial judge that there was no exculpatory or contradictory information in the tapes, defendants maintained that the trial judge should himself listen to the tapes in order to determine whether the defense was entitled to obtain them in the interest of justice. The trial judge declined to do so, and appellants argue that a government prosecutor cannot be expected to be able to make a meaningful evaluation of what material may be useful to defense counsel and that, at the least, possibly useful material should be objectively reviewed by the trial judge. We realize that the problem is a real one which has been the subject of substantial discussion. See, e.g., ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 73-78 (1969); Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136, 147-49 (1964). However, appellants themselves concede the lack of any precedent for such a procedure, and indeed, this court has very recently restated the present legal principle that, with certain limited exceptions not here applicable, "the assurance by the government that it has in its possession no undisclosed evidence that would tend to exculpate defendant justifies the denial of a motion for inspection that does not make some particularized showing

of materiality and usefulness." *United States* v. *Evanchik*, F. 2d , (2d Cir. July 16, 1969). The request here was for a known item—tapes of conversations to which one or more defendants were parties; the record below discloses no such particularized showing of need; and as we have already noted, we have examined the transcript of the tapes and found it to contain nothing that would have been additionally useful to the defense.

III. The McCarthy-O'Brien Transaction

Appellants' next argument is that evidence about the fraudulent bank account established with the check of the deceased Mary McCarthy, introduced over their objections, should have been excluded because its probative value was far outweighed by its prejudicial effect. In addition, they object to the Government's introduction of false grand jury testimony by Crisona relating to the transaction and cross-examination in which Crisona repeatedly contradicted that testimony. The Government contends, on the other hand, that the check episode was admissible to show motive for appellants' subsequent conduct, i.e., proceeds from the Sunrise Mountain Corporation fraud were needed and used to pay off the $9,100 overdraft created when the McCarthy check was stopped. Secondly, the Government justifies the introduction of the transaction and Crisona's grand jury testimony about it as relevant to Crisona's credibility.

It has been this court's "consistently held position that evidence of similar acts, including other crimes, is admissible for any relevant purpose other than merely to show defendant's bad character." *United States* v. *Johnson*,

382 F. 2d 280, 281 (2d Cir. 1967). We do not think that the substantial and pressing financial obligation arising from the transaction is of insignificant probative value on the issue of appellants' motivation for their subsequent frauds. Cf. *United States* v. *Kahaner,* 317 F. 2d 459, 470-72 (2d Cir.), cert. denied, 375 U.S. 836 (1963). Nor are we impressed by the magnitude of the prejudicial impact of what appellant Crisona terms "the repulsive tale as to the theft of the dead woman's check" in the context of appellants' numerous other financial misappropriations. Cf. *United States* v. *Bradwell,* 388 F. 2d 619, 622 (2d Cir.), cert. denied, 393 U.S. 867 (1968); *United States* v. *Jordan,* 399 F. 2d 610, 612-13 (2d Cir.), cert. denied, 393 U.S. 1005 (1968). Moreover, it was the defendants themselves who, on cross-examination of government witness Neiman, brought out the "repulsive" aspects of the affair—that the check was stolen and that Mary McCarthy was dead. Finally, the trial judge took pains in his instructions to the jury to limit the effect of the evidence. Appellants rely heavily on the decision of this court in *United States* v. *Byrd,* 352 F. 2d 570 (2d Cir. 1965). But we have made clear that *Byrd* itself only "reiterated that where the pertinent factors have been duly considered, the admissibility of the evidence is a matter in which the trial judge should be allowed a wide range of discretion." *United States* v. *Deaton,* 381 F. 2d 114, 118 n. 3 (2d Cir. 1967). Assessing the "pertinent factors" here involved, we do not think that the trial judge abused his discretion.

IV. Failure to Rule in Advance on Defendants' Convictions

Appellant John DeLyra contends that the trial judge erred in refusing to make an advance ruling with regard to the admissibility for impeachment purposes of certain prior convictions. During a recess on a Friday near the end of the Government's case, the attorney for both John and Anthony DeLyra informed the judge that he was "contemplating the possibility" that either or both would testify but that he understood that both had been convicted of crimes 25 or more years before; he requested the court to rule whether it would allow the Government to bring out the convictions if the defendants were to testify. The following Monday the trial judge declined to make such an advance ruling. On appeal, we are told that John DeLyra had been convicted of vagrancy and of petit larceny in 1935, and that between 1937 and 1940 he was charged with concealment of leased property, for which he was ultimately fined $300.[7] Appellant, relying largely on this court's decision in *United States* v. *Palumbo*, 401 F. 2d 270 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969), argues that these ancient and relatively minor convictions should not have been available to the Government to impeach his credibility and that the trial judge had discretion to prevent such use and should have so ruled before appellant decided whether to take the stand.

It is true that *Palumbo* stands for the proposition that a trial judge has discretion to exclude evidence of prior crimes in an appropriate case and to decide to do so in advance of defendant's testifying. However, while such a practice may

[7] Anthony DeLyra apparently does not press this claim of error on appeal; in any event, our disposition of it would be the same.

sometimes be desirable, *Palumbo* does not suggest, as appellant would have us rule, that it is necessarily error for the judge to defer exercising that discretion until the defendant has in fact testified. Indeed, in *Palumbo* itself, we stressed that the trial judge has discretion in this area, see 401 F. 2d at 274, and we have subsequently approved a district court's discretionary refusal to make advisory rulings in similar circumstances. See *United States* v. *Evanchik*, —— F. 2d —— (2d Cir. July 16, 1969); *United States* v. *Hart*, 407 F. 2d 1087, 1088-89 (2d Cir. 1969). Under these circumstances, we hold that there was no abuse of discretion in the trial judge's failure to make an anticipatory ruling.

V. Objections to Jury Instructions

1. *Charge on intent*

Appellant Anthony DeLyra contends that the trial judge, in instructing the jury, failed to make clear that the element of criminal intent must have been proved as to each of the charges beyond a reasonable doubt. In charging on the many different counts, the judge repeatedly included intent or knowledge as one of the elements which the Government had to establish beyond a reasonable doubt as to each offense. Immediately after the charge, defense counsel took exception to the court's failure specifically to instruct the jury on the elements of wilfulness and knowledge. Consequently, the judge then gave the supplemental charge:

> Ladies and gentlemen, I am told that in my charge in explaining the counts . . . that I called the wire crimes and travel crimes and the transport-money-by-fraud crimes, I neglected to tell you one of the elements that the government must prove with regard to each

> defendant accused in those crimes is that he did the act complained of knowingly and wilfully; and that means that he had to have an evil intent at the time of the alleged crime; not something that he did negligently or accidentally but purposefully. In other words, he had a criminal intent when he is alleged to have committed these crimes.

Appellant apparently argues that the court should have again stated that this element of the crime had to be proved beyond a reasonable doubt. In view of the judge's prior instructions, this was unnecessary. Indeed, defendants made no further objection. Cf. *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U.S. 907 (1966).

2. *Missing witness charge*

Appellant John DeLyra raises as error the trial judge's instruction on missing witnesses. In his summation counsel for Crisona several times called attention to the failure of the Government to summon certain individuals as witnesses; in reply, the prosecuting attorney noted that the defense could have obtained the presence of witnesses by subpoena. In his jury charge, the trial judge commented:

> During summations there was considerable reference to where a certain witness was and to the fact that he wasn't called. In a federal criminal trial both the government and a defendant are entitled to receive from the clerk of the court a subpoena calling for the attendance of a witness, and no matter where the witness lives in the United States, he is required to appear when served with such a subpoena.
>
> Now, X or Y or Z could have been called by either side as a witness, so that from the failure of either

> side to call him or them you may infer that his or their testimony might have been unfavorable to either the government or to a defendant, but it is equally within your discretion to draw no inference at all from the failure of the government or a defendant to call X or Y or Z.

Appellant argues that allowing the jury to draw an unfavorable inference from his failure to call a witness infringes upon his right to rest upon the Government's burden of proof. But we have long held that it is proper to instruct the jury that "the failure to produce such a witness is open to an inference against either party." *United States* v. *Dibrizzi*, 393 F. 2d 642, 646 (2d Cir. 1968); see *United States* v. *Armone*, 363 F. 2d 385, 404-05 (2d Cir.), cert. denied, 385 U.S. 957 (1966); *United States* v. *Evanchik*, *supra*, F. 2d at . Additionally, appellant argues that this charge is only permissible where the witness is "equally available" to both sides, that the power to subpoena does not establish "equal availability," and that in fact the witnesses referred to were not "as a practical matter" available to the defendant. We noted in *United States* v. *Armone*, *supra*, 363 F. 2d at 405, that "[i]f the court had stated that a witness was available who was not, in fact, available, a different picture might have been presented," but defendant made no assertion either below or here on appeal that any specific individual was unavailable to him. Indeed, no exception whatever was taken to the charge, which is sufficient in itself to be dispositive. See *United States* v. *Indiviglio*, *supra*. In sum, we find no merit in appellants' objection to the charge.

VI. Improper Juror Discussions

Shortly before the charge, counsel for the DeLyras represented to the judge that there had been improper discussions among the jurors. Rose DeLyra, sister-in-law of the DeLyras, then testified that a few days before she had heard three female jurors discussing the case in the ladies' room and that one of them had said "He's guilty," and another, "If you ask me they're all guilty." Mrs. DeLyra said she could identify with certainty only one of the women and was uncertain who had said what. Counsel for the DeLyras requested an inquiry of the jurors and the trial judge agreed that he would conduct one. Subsequently the judge did confer *in camera* with each of the four female jurors and a female alternate juror, and stated that he was satisfied that there was no basis in fact for Mrs. DeLyra's testimony. On appeal, John DeLyra claims that the judge should have conducted a hearing in open court on the matter with defense counsel present. However, there is no indication that any defense counsel ever requested such a hearing, objected to the judge's course of action, or even took exception to his conclusion. Consequently there is no merit to appellant's contention. See *United States* v. *Kahaner*, 317 F. 2d 459, 482-83 (2d Cir.), cert. denied, 375 U.S. 836 (1963). Moreover, the procedure adopted by the judge seems to have been reasonable under the circumstances. See *Miller* v. *United States*, 403 F. 2d 77, 81-82 (2d Cir. 1968); cf. *United States* v. *Woodner*, 317 F. 2d 649, 651-52 (2d Cir.), cert. denied, 375 U.S. 903 (1963).

VII. Sufficiency of the Evidence Against Parks

The main argument of appellant Parks is that the evidence against him was insufficient to support his conviction, and that there was no showing that he knowingly participated in the illegal schemes or had any motive for such a participation. Taking the evidence, as we must, from the view most favorable to the Government, we find sufficient grounds on which the jury could reasonably have reached its conclusion as to appellant's guilt. To summarize the most important facts: Parks was present at meetings among the conspirators at which the details of the scheme were planned and carried out; he received substantial shares of the proceeds of fraudulently obtained advance fees; he presented himself, or was presented, to various victims under aliases and in false capacities and made a variety of misrepresentations to these victims about Columbia Resources. In the light of his intimate and prolonged connection with the other defendants and their illegal enterprise it is not surprising that the jury found unpersuasive his assertion that he was merely an innocent dupe.

Parks raises a second claim of error relating to an allegedly prejudicial line of questioning by the trial judge about certain written appraisal records, but we find it wholly without merit.

Judgments affirmed.